FEDERAL MARITIME COMMISSION

46 CFR Part 542

[Docket No. FMC-2023-0010]

RIN 3072-AC92

Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier

AGENCY: Federal Maritime Commission.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission (Commission) issues this supplemental notice of proposed rulemaking (SNPRM) to address a statutory requirement arising from the Ocean Shipping Reform Act of 2022 that prohibits ocean common carriers from unreasonably refusing to deal or negotiate with respect to vessel space accommodations and a related prohibition against unreasonably refusing cargo space accommodations. This proposal revises certain aspects of the proposed rule issued on September 21, 2022, by modifying defined terms and discussing the relationship between the United States Code and the elements required to establish violations of those provisions. This SNPRM is issued in response to comments to the original proposal and to more directly provide a potential standard for unreasonable conduct by ocean common carriers that prevents shippers from obtaining space aboard vessels for their cargo. In this SNPRM, the Commission proposes to: define unreasonable by stating a general principle and a non-exhaustive list of examples of unreasonable conduct; establish the elements for a refusal of cargo space accommodations; revise the definition of transportation factors to focus on vessel operation considerations; clarify that vessel space services were already included in the definition of vessel space accommodations and add a definition for cargo space accommodations; define documented export policy and add mandatory document export policy

requirements; and remove the voluntary certification provision. The Commission seeks comments on these changes.

DATES: Submit comments before 11:59 p.m. EDT on **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Since the publication of the NPRM, the Commission has transitioned from accepting comments via email and using its Electronic Reading Room for rulemaking activities to accepting rulemaking comments exclusively through the Federal eRulemaking Portal at www.regulations.gov. The docket of this SNPRM can be found at https://www.regulations.gov/ under Docket No. FMC-2023-0010. The NPRM and related comments can be found in this new docket. Also, comments to this SNPRM may be submitted and viewed there. Please refer to the "Public Participation" heading under the **SUPPLEMENTARY INFORMATION** section of this notice for detailed instructions on how to submit comments, including instructions on how to request confidential treatment and additional information on the rulemaking process.

FOR FURTHER INFORMATION CONTACT: William Cody, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Legislative Authority and Regulatory History

On September 21, 2022, the Commission proposed adding a new part 542 under title 46 of the Code of Federal Regulations (CFR) that would address prohibited acts by ocean common carriers under 46 U.S.C. 41104(a)(10). 87 FR 57674. The proposal was issued in response to certain obligations imposed on the Commission as a result of legislation signed by the President on June 16, 2022. That legislation, the Ocean Shipping Reform Act of 2022 (OSRA 2022), amended various statutory provisions contained in Part A of Subtitle IV of Title 46, United States Code, which collectively comprise the Shipping Act. Among these changes were

amendments to 46 U.S.C. 41104(a)(3) and (a)(10) along with accompanying requirements for the Commission to initiate and complete specific rulemakings related to each amendment.

Although OSRA 2022's focus on export cargo is new, the Commission and the courts have considered similar Shipping Act prohibitions against unreasonable conduct and refusals to deal or negotiate in the past.

Section 7(d) of OSRA 2022 requires the Commission, in consultation with the United States Coast Guard, to initiate and complete a rulemaking to define the phrase "unreasonable refusal to deal or negotiate with respect to vessel space accommodations" and this rulemaking implements that requirement. This rulemaking now also addresses OSRA 2022's amendment to part of section 41104(a)(3), which prohibits a common carrier from unreasonably refusing cargo space accommodations when available. At a different time, the Commission will address the statutory requirement in section 7(c) of OSRA 2022 to complete a rulemaking defining unfair or unjustly discriminatory methods in a separate rulemaking.

B. Need for SNPRM

After receiving comments on its proposal and examining the feedback received in response, the Commission has decided to issue this SNPRM to further explore certain issues and to modify other aspects of the initial September 2022 proposal. The Commission proposes to make the following changes: (1) revise the definition of transportation factors to focus on vessel operation considerations; (2) revise the definition of the term unreasonable to include a general definition and a non-exhaustive list of unreasonable conduct scenarios; (3) clarify that vessel space services are already included in the definition of vessel space accommodations; (4) remove the voluntary export strategy documentation language; (5) propose a definition of documented export policy and that ocean common carriers submit a documented export policy to the Commission once per year; and (6) remove the voluntary certification provision. These modifications, along with the reasoning behind these changes, are discussed in the sections that follow.

In its September 2022 proposal, the Commission explained that OSRA 2022 amended 46 U.S.C. 41104(a) as a whole by replacing "may not" with "shall not" to highlight the mandatory nature of that section's list of common carrier prohibitions and sought comment on the treatment of these terms. *See* 87 FR 57674. The Commission sought comment on its initial proposal to apply the amended prohibitions under section 41104(a)(10) to ocean common carriers and its proposed definition of the phrase "unreasonable refusal to deal or negotiate with respect to vessel space accommodations" contained in that provision. The Commission also noted other key terms and phrases remained undefined, such as "unreasonably," "refuse to deal or negotiate," and "vessel space accommodations," and sought comment regarding the meaning of these terms. *See* 87 FR 57676-57677.

In applying the common carrier prohibitions in 46 U.S.C. 41104, the Commission stresses that the statute does not distinguish between U.S. exports or imports and this supplemental proposal also applies to both. The Commission explained its basis for this view as part of its initial proposal, noting the challenges faced by U.S. exporters to obtain vessel space and observing that the purpose of the Commission's authority under the Shipping Act contains an export focus while also noting reports of restricted access to equipment and vessel space for U.S. importers, particularly in the Trans-Pacific market. 87 FR 57674-57675. Further background and discussion on market conditions can be found in the notice of proposed rulemaking. 87 FR 57674-57675.

The Commission also notes that nothing in the previous proposed rule or in this SNPRM is meant to restrict the ability of ocean common carriers to reposition empty containers. The repositioning of empty containers can include the use of sweeper vessels. Vessels cannot be arbitrarily designated as sweeper vessels to avoid accepting exports. After the fact or ad hoc reclassifications of a vessel as a sweeper vessel may be closely scrutinized by the Commission. A shipper or the Commission's Bureau of Enforcement, Investigations, and Compliance (BEIC) can also allege that a reclassification was a subterfuge to avoid providing vessel space for

exports. As the Commission previously explained, staff review of ocean common carrier documents indicates that ocean common carriers typically maintain documented procedures and policies related to their operations. The Commission stated further that effective export policies should be tailored to specific categories of cargoes and include documented policies on export business practices. Because every ocean common carrier operating in the U.S. market is presumed by the Commission – barring the submission of further information to the contrary – to be able to transport both exports and imports, an ocean carrier may not categorically exclude U.S. exports from its service without showing how this action is reasonable. 87 FR 57675. This presumption continues to apply in this SNPRM.

The Commission also took note of common carrier assertions that they have seen delays in the movement of export cargo due to a lack of mutual commitment between shippers and common carriers leading to cancellations of vessel space accommodation by either party, sometimes as late as the day of sailing. These actions contribute to uncertainty for both the common carriers and shippers. *See* 87 FR 57675. Bookings canceled by common carriers lead to rolled freight and other negative consequences for shippers. *See* American Chemistry Council (ACC) at 4.

Finally, as stated in the initial proposed rule and elsewhere, ocean common carriers and those with whom they contract to operate and load/unload their vessels have the best information on the ability of any particular vessel to accept cargo for import or export – information that shippers generally do not have. *See* 87 FR 57675-57676; *see also* Fact Finding Investigation 29 Final Report (F.M.C.), 2022 WL 2063347 at 11, 21-23, 26, 34-35 (noting difficulties experienced by non-carrier entities to obtain information such as earliest return dates and vessel scheduling information held by ocean common carriers). As a result, the Commission proposed a mechanism by which, upon a prima facie case of a violation of section 41104(a)(10) being made, the burden would shift from the shipper (or the BEIC) to the ocean common carrier. At this step, the ocean common carrier would need to satisfy its burden of showing that the refusal to deal or

negotiate was reasonable. The Commission stressed that its proposal concerned the negotiations or discussions that lead up to a decision about whether an import or export load is accepted for transportation. It added that while there will be situations where an ocean common carrier and a shipper engage in good faith negotiations or discussions that do not result in the provision of transportation, cases where an ocean common carrier categorically excludes U.S. exports from its service will create a presumption of an unreasonable refusal to deal. *See* 87 FR 57675-57676.

The specific provisions of OSRA 2022 that are the subject of this SNPRM are new, and accordingly there is a lack of prior Commission precedent to aid in interpretation of this newly-enacted amendment. In the Commission's history, many cases found the essence of the prohibition on unreasonable refusals to deal or negotiate in contravention of the amended section 41104(a)(10) and its predecessors to be the imposition by a common carrier of an unreasonable impediment to a shipper's access to common carriage. Such impediments can take many forms, and no legislation or regulatory process can predict or attempt to encompass every possible scenario in which an unreasonable refusal to deal or negotiate might occur. Thus, the caselaw is instructive when considering the new legislation. Commission determinations will be factually driven and determined on a case-by-case basis.

This SNPRM describes how the Commission will consider private party adjudications and agency-initiated enforcement cases in which violations of 46 U.S.C. 41104(a)(3) and (a)(10) are alleged relating to unreasonable refusal to provide cargo space accommodations and/or refusals to deal by ocean common carriers. It also considers the common carriage roots in the Shipping Act, as well as the overall competition basis of the Commission's authority,[1] and lays out the framework for considering violations of section 41104(a)(10). In this SNPRM, the Commission continues to note that future cases that allege violations of section 41104(a)(3) and (a)(10) will be factually driven and determined on a case-by-case basis. The framework for this supplemental proposal is taken from Commission precedent on refusal to deal cases generally

[1] *See Orolugbagbe v. A.T.I.,U.S.A., Inc.*, Informal Docket No. 1943(I) at *31-38.

and on suggestions offered by commenters.

C. Inclusion of claims of unreasonable refusals of cargo space accommodations subject to 46 U.S.C. 41104(a)(3).

Although this rulemaking was initiated under OSRA 2022 section 7(d) to define terms and elements required for a cause of action under 46 U.S.C. 41104(a)(10), shippers and exporters in particular commented on conduct that occurs outside the scope of that provision. Section 41104(a)(10) prohibits unreasonable refusals during the negotiation stage, when the parties do not have an existing relationship and/or are initiating negotiations over terms and conditions of service. That is different from conduct prohibited under 46 U.S.C. 41104(a)(3). The latter would apply to situations where the parties have an existing relationship and/or already mutually agreed on terms and conditions via a booking confirmation, but the ocean common carrier then unreasonably refuses cargo space accommodations when available, or in other words, refuses to execute on the deal negotiated on the previously agreed-upon terms.

The restrictions that 46 U.S.C. 41104(a)(3) and (a)(10) impose on ocean common carriers are distinct but closely related. Both provisions address refusals by ocean common carriers to accommodate shippers' attempts to secure overseas transportation for their cargo. The distinction between the conduct covered by these two provisions is timing, more specifically whether the refusal occurred while the parties were still negotiating and attempting to reach a deal on service terms and conditions (negotiation stage) or after a deal was reached (execution stage). If the refusal occurred at the negotiation stage, 46 U.S.C. 41104(a)(10) would apply. If the refusal occurred at the execution stage, after the parties reached a deal or mutually agreed on service terms and conditions, then 46 U.S.C. 41104(a)(3) would apply. When a shipper acting in good faith follows the export policy of the ocean common carrier with which it has been negotiating, either 46 U.S.C. 41103(a)(3) or (a)(10) would still apply if the shipper was unreasonably denied space.

Comments to the NPRM show that shippers and exporters in particular consistently cited blank sailings, no-notice or delayed notice of schedule changes, inadequate loading times, and

similar actions as primary drivers that prevented them from getting their cargo to overseas markets. These impediments occur during the execution stage over shippers' interactions with ocean common carriers, taking them outside the scope of 46 U.S.C. 41104(a)(10) and beyond the confines of the initial proposal. In order to fully address the comments received, the Commission has decided to issue an SNPRM and expand the scope of the rulemaking. Rather than defer addressing these concerns in a separate rulemaking, the Commission proposes broadening the scope of this rulemaking. The Commission is also currently working on addressing section 7(c) of OSRA 2022 and will separately complete a rulemaking defining different terms than those defined in this SNPRM from section 41104(a)(3), i.e., "unfair or unjustly discriminatory methods."

Protecting shippers from unreasonable refusals to deal or negotiate only partially addresses the obstacles that shippers and trade associations have identified in the comments as major impediments to their ability to get their cargo to overseas markets. As commenters have pointed out, there are far-reaching consequences that cannot easily or quickly be reversed if they cannot meet their contractual obligations to their overseas buyers. U.S. exporters' ability to rely on ocean common carriers meeting their obligations by providing cargo space accommodations negotiated for or as advertised is a critical component of that equation. U.S. exporters are in an untenable position if they cannot rely on vessels calling at U.S. ports to load and transport their cargo to overseas destinations as scheduled or agreed to by the ocean common carrier. Missed or late deliveries to overseas buyers are likely to cause them to lose confidence in the reliability of their U.S. suppliers and prompt them to look to alternative suppliers from other countries able to commit to a more reliable delivery system. Overseas buyers would not continue dealing with U.S. suppliers who repeatedly miss delivery dates and cannot promise on-schedule deliveries because they are at the mercy of ocean common carriers who unpredictably change scheduled sailings, blank scheduled sailings, or otherwise unreasonably refuse to execute on their commitments. Business that U.S. exporters lose to competitors from other countries will be

difficult to recapture over the short term and perhaps over the long term as well. The longer reliability issues persist, the more harm U.S. exporters will suffer and the more difficult it will be to restore lost confidence in ocean transportation for U.S. exports.

Restricting this rulemaking to refusals to deal or negotiate under 46 U.S.C. 41104(a)(10) will not address the reliability issues that commenters identified as a critical and a driving factor impeding their ability to ship cargo overseas. Shippers impacted by unlawful refusals to accommodate their requests for vessel space accommodations have been able to bring a cause of action against ocean common carriers since the OSRA 2022 amendments took effect immediately in June 2022. They may find it more difficult, however, to plead, and prevail on those claims without implementing regulations from the Commission defining the elements and statutory terms. Parties may also find it more difficult to identify and litigate claims for unreasonable refusals under 46 U.S.C. 41104(a)(3) without a clearer indication from the Commission of conduct covered by that provision as distinguished from 46 U.S.C. 41104(a)(10). Absent further guidance now from the Commission, shippers and BEIC are likely to devote considerable resources to litigating how an "unreasonable refusal" under 46 U.S.C. 41104(a)(3) should be defined and the elements required to prove a violation of that provision. That may make litigating 46 U.S.C. 41104(a)(3) claims a time-consuming and resource-intense process as parties litigate not just the facts of their particular case but also advocate for their proposed interpretation of key terms like "unreasonable refusal" and the factors relevant in determining whether an ocean common carrier acted unreasonably. Parties would also expend time litigating the difference between "unreasonable refusals to deal or negotiate" and "unreasonable refusals to provide vessel space accommodations."

Clearly delineating these distinctions as part of the current rulemaking will lessen the time and resources that shippers, carriers and the Commission will otherwise need to devote to defining these concepts in individual cases. Defining the elements and terms used in 46 U.S.C. 41104(a)(3) requirements as part of this rulemaking is also important because in practice it may

be difficult to discern whether a carrier's refusal was at the negotiation or execution stage and additional guidance now from the Commission may help avoid needless disputes over that issue. Shippers' and carriers' interactions about service terms and conditions and securing vessel space may not always march consistently forward from the initial offer through booking and loading cargo on the vessel bound for the destination point. It is important for ocean common carriers to have sufficient guidance to conform their conduct and practices to fall within the bounds of reasonable or unreasonable within the meaning of 46 U.S.C. 41104(a). Also, this rule would ensure that shippers can readily discern when a carrier has acted outside the bounds of reasonableness and know what type of claim to bring before the Commission.

Interpreting these related provisions in tandem in a single rulemaking will allow the Commission to delineate the types of refusal conduct covered by 46 U.S.C. 41104(a)(3) and (a)(10) and highlight where the differences are between them.

D. Differences in Cases Involving Section 41104(a)(10) and Section 41104(a)(3).

Generally, the distinction between those acts covered under section 41104(a)(3) and those falling under section 41104(a)(10) is temporal-based. Although it is possible for claims to arise later in the process, "refusal to deal or negotiate" (section 41104(a)(10)) will frequently involve those actions occurring prior to a carrier providing a shipper with a booking confirmation to carry that shipper's cargo. If negotiations to reach an agreement have ceased (or if efforts to engage in negotiations were ignored), then a claim of unreasonable refusal to deal or negotiate under section 41104(a)(10) could arise. When read in conjunction with this provision, to "unreasonably refuse cargo space accommodations" or "resort to other unfair or unjustly discriminatory methods" under section 41104(a)(3) would necessarily involve a set of acts that occur after a booking has been confirmed. As a result, this SNPRM adds to the scope of the original NPRM by proposing to address those refusals that occur at the execution stage, after the parties reached a deal or mutually agreed on service terms and conditions via a booking confirmation subject to section 41104(a)(3). In a future rulemaking, the Commission will define

"unfair and unjustly discriminatory methods" within the meaning of section 41104(a)(3). The Commission seeks comment on its approach with respect to the difference between potential violations of 46 U.S.C. 41104(a)(3) and 46 U.S.C. 41104(a)(10).

II. Comments to the NPRM and Responses by the Commission

In developing this SNPRM, the Commission carefully considered the comments it received regarding its previous proposed rule. These comments, along with issues relevant to those comments, are addressed in greater detail in the discussion that follows.

A. Commenters

The Commission received responses from shippers, shipping industry trade associations, common carriers, and governmental entities. These commenters consisted of the following entities:

Commenters	Entity Type
Agriculture Transportation Coalition (AgTC)	Shippers Trade Association
American Chemistry Council (ACC)	Shippers Trade Association
American Cotton Shippers Association (ACSA)	Shippers Trade Association
BassTech International (BassTech)	Shipper
Consumer Brands Association (CBA)	Shippers Trade Association
CMA CGM (America) LLC	Carrier
Dole Ocean Cargo Express, LLC (DOCE)	Carrier
International Federation of Freight Forwarders Association (FIATA)	Freight Forwarding Trade Association
International Dairy Foods Association (IDFA)	Shippers Trade Association
International Fresh Produce Association (IFPA)	Shippers Trade Association
Lanca Sales, Inc.	Shipper/Beneficiary Cargo Owner
Meat Import Council of America and North American Meat Institute (MICA/NAMI)	Shippers Trade Association
National Association of Chemical Distributors (NACD)	Shippers Trade Association
National Association of Manufacturers (NAM)	Shippers Trade Association
National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA)	Freight Forwarder, Custom Broker, and Ocean Transportation (incl'g Carriers) Trade Association
National Fisheries Institute (NFI)	Shippers Trade Association
Northwest Horticultural Council (NHC)	Shippers Trade Association
National Industrial Transportation League and Institute for Scrap Recycling Industries, Inc. (NITL/ISRI)	Shippers Trade Association
Pacific Merchant Shipping Association (PMSA)	Carrier Trade Association
Retail Industry Leaders Association (RILA)	Shippers Trade Association
Tyson Foods (Tyson)	Shipper
U.S. Dairy Exporters Council (USDEC)	Shipper Trade Association
World Shipping Council (WSC)	Carrier Trade Association
Members of the House of Representatives (Congress)	Legislative Branch (Federal) – multiple comments
United States Department of Justice (DOJ)	Executive Branch (Federal)
United States Department of Agriculture (USDA)	Executive Branch (Federal)

Except as noted, each relevant comment is addressed within the context of the specific topics raised. These topics are discussed in detail in the sections that follow.

1. General Comments from Federal Government Commenters

The Commission notes that it received four separate submissions from Federal commenters. One set of comments was submitted by a group of seven Members of the House of Representatives – Representative John Garamendi, Representative Dusty Johnson, Representative Jim Costa, Representative Adrian Smith, Representative Mike Thompson, Representative David G. Valadao, and Representative Jimmy Panetta. The Members made the specific point that "[o]cean carriers refusing to accommodate American exports is an unreasonable business practice and, following passage of the Ocean Shipping Reform Act of 2022, also is now illegal." Congress at 1. It also received one comment jointly submitted by Senator John Thune, Senator Amy Klobuchar, Senator John Hoeven, and Senator Tammy Baldwin. The Senators state they have received reports of ocean carriers refusing certain export cargo, particularly agricultural cargo, even when vessel space was readily available, and often opting to carry empty containers instead. Senate at 1. Also, the Senators urge the Commission to consider whether additional clarifying language about the magnitude of the "transportation factors" might provide useful industry guidance. *Id.*

The Commission greatly appreciates the comments offered by the Members and Senators. As the Commission agrees and explained in its proposal, the categorical refusal to accommodate U.S. exports, without demonstrating that the refusal is reasonable, would violate 46 U.S.C. 41104(a)(10). 87 FR 57675. Under section 41104(a)(10), an ocean common carrier's refusal to deal or refusal to negotiate must be unreasonable to constitute a violation. *See* 46 U.S.C. 41104(a)(10). By definition, not all refusals will necessarily violate this provision. Whether a refusal to deal or a refusal to negotiate falls within the scope of section 41104(a)(10) depends upon the particular circumstances in a given case.

In response to various public comments, including those from Senators Thune, Klobuchar, Hoeven, and Baldwin, the Commission is proposing new language that relies on both 46 U.S.C. 41104(a)(3) and (a)(10) to address more comprehensively potential violations related to refusal to deal or negotiate. The new proposed approach covers a broader set of conduct, explicitly including those instances where an ocean common carrier refuses export cargo even when vessel space was readily available. This SNPRM also revises the definition of transportation factors and proposes to remove the language initially referring to scheduling considerations.

The Antitrust Division of the United States Department of Justice (DOJ) also submitted comments and agreed that reasonableness is necessarily a case-by-case determination. However, DOJ expressed concern that the Commission's proposed criteria to prove the statutory elements of "refusal to deal" and "unreasonable" would be too difficult to establish. DOJ also suggested including additional considerations, such as the parties' prior course of dealings or whether a carrier, after issuing a refusal, offered the affected shipper any remedies or assistance. DOJ suggested that information may be relevant in deciding whether the carrier's refusal was unreasonable. The Commission adopted DOJ's proposed language on further remedies or assistance offered to the shipper and added it to the proposed rule in § 542.1(d)(1). DOJ also believes that it would be critical to evaluate past business actions in the context of allegations to refuse the provision of service.

As to DOJ's concern that the proposed standard for establishing the second and third elements of a prima facie case may set the bar too high by suggesting that complainants must show an actual refusal to even entertain their proposal, this SNPRM clarifies that is not a required showing and emphasizes that claims will be evaluated on a case-by-case basis.

As to the elements that the Commission would rely on to make a determination of reasonableness, the Commission believes that the new proposed elements form an appropriate basis for determining whether an ocean common carrier has acted reasonably in refusing to deal

with a particular shipper. Those elements are: (1) whether the ocean common carrier follows a documented export policy enabling the efficient movement of export cargo; (2) whether the ocean common carrier engaged in good-faith negotiations; (3) the existence of legitimate transportation factors; and (4) any other factors the Commission deems relevant. These elements, when coupled with the opportunity for the ocean common carrier to establish that conduct was reasonable, are both workable and fair by allowing potential claimants to bring complaints of violations under section 41104(a)(10) and shifting the burden of production of information to the carrier to justify its actions. And in evaluating a given case, the Commission's proposed approach in this SNPRM would provide the information it would need and also enable it to consider other relevant factors such as prior dealings and mitigation measures in determining whether a refusal was unreasonable.

Finally, DOJ noted that the terms "deal" and "negotiate" have different meanings under the antitrust laws and encouraged the Commission to define those terms in the Commission's rule. DOJ at 4-5. It states that the term "negotiate" refers to the discussion about a particular transaction, while "deal" typically refers to the transaction itself – whether it be the provision of goods or services. DOJ at 5. The goal of prohibiting unreasonable refusal to deal or negotiate by ocean common carriers with respect to vessel space will be achieved better by giving the terms their ordinary meanings. That way, the Commission will be able to address unreasonable refusal to deal or negotiate with respect to vessel space with more flexibility. That is consistent with our case-by-case approach which DOJ endorses.

The Secretary of the United States Department of Agriculture (USDA) submitted a comment and asked the Commission to broaden the definition of an unreasonable refusal to deal or negotiate, narrow the proposal's guidance on reasonableness, and encourage specific actions by carriers to guard against engaging in an unreasonable refusal. USDA suggested the Commission specify certain actions, such as cancellations without sufficient notice, perpetual re-bookings, and failure to provide necessary equipment, in the definition of refusal to deal or

negotiate. USDA at 2. The points that USDA focuses on as potentially unfair or unjustly discriminatory conduct may be refined at a later date through another rulemaking or on a case-by-case basis.

USDA also suggested that in considering reasonableness of refusal to deal or negotiate, "[t]he Commission should excuse only a few exceptional circumstances." USDA at 2. It urged the Commission to narrow the language on reasonableness and clarify that the existence of multiple factors (such as profitability, business development strategy, or transportation factors) will not absolve problematic practices. USDA also encouraged "clearer, more affirmative duties for carriers, greater specificity with respect to the requirements they need to meet, and that non-confidential portions of these documents be made available for shippers and the public to review." USDA at 2-3. This SNPRM includes greater specificity and strives to better delineate each party's duties when communicating with each other about vessel space accommodations. The Commission's NPRM included some of the factors USDA discussed, and it does not absolve problematic practices based upon just a few factors or certain affirmative actions. Rather, each case will be considered under the totality of the circumstances to prohibit all possible unreasonable refusals to deal or negotiate by ocean common carriers with respect to vessel space accommodations.

2. Inability to Obtain Vessel Space for Export Cargo Despite Having Previously Negotiated Terms and Conditions

Comments from the Retail Industry Leaders Association (RILA) assert that an unreasonable refusal to deal or negotiate is not confined to the negotiation stage under 46 U.S.C 41104(a)(10) but can arise at any point in the parties' dealings short of the point at which the shippers' cargo is actually loaded aboard the vessel. As RILA explains:

> The "lived experience" of U.S. importers during the COVID-19 pandemic has demonstrated that unreasonable refusals to deal or negotiate can arise not only in the context of negotiating (or refusing to negotiate) the terms of a service contract before it is entered into, or of booking (or seeking to book) carriage pursuant to the common carrier's published tariff before cargo is tendered, but also during the term of a service contract and even after the provision of (or failure to provide) the services contemplated.

RILA Comments at 3. RILA urged the Commission to address this issue by expansively defining unreasonable refusals to deal or negotiate within the meaning of section 41104(a)(10) to include actions or communications that "can arise at any point in parties' dealings with each other." *Id*.

The Commission understands and concurs with the concern underlying this suggestion but does not agree that expanding the definition of unreasonable refusal to deal or negotiate within the meaning of section 41104(a)(10) is the solution. As discussed elsewhere in this proposal, the Commission proposes defining section 41104(a)(3) and (a)(10) in tandem as the better solution. Further, as also mentioned in this discussion, expanding the definition of conduct governed by 46 U.S.C. 41104(a)(10) to include the same conduct prohibited by section 41104(a)(3) would render meaningless (at least in part) the section 41104(a)(3) language prohibiting unreasonable refusals to accept cargo. That interpretation would violate the canon of statutory construction against construing the statute in a manner that renders language superfluous or meaningless.[2]

RILA further explains that in its experience,[3] unless shippers have enforceable service contracts, they "are unable to protect themselves from volatile shipping rates and ocean carriers have few forecasting tools to provide the shipping capacity necessary to serve their customers." *Id.* at 3. RILA suggests as a partial remedy that the Commission explicitly announce that the existence of a service contract does not insulate a common carrier from a claim that it violated 46 U.S.C. 41104(a). This SNPRM should clarify that carriers are not immune from 46 U.S.C. 41104(a)'s restrictions because they have a service contract with the shipper. Although the

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[2] "It is 'a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) quoting *Duncan v. Walker*, 533 U.S. 167 (2001); *United States v. Menasche*, 348 U.S. 528, 538–539, (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' " (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152, (1883)).

[3] RILA also points to concerns identified in the Commission's Final Report on Fact Finding Investigation 29 in which Commissioner Rebecca F. Dye emphasized that "[f]or some time, [she] has been concerned that the contracts negotiated by many U.S. importers and exporters lack . . . mutuality of understanding and obligation and are not enforceable. Without enforceable contracts, shippers are unable to protect themselves from volatile shipping rates and ocean carriers have few forecasting tools to provide the shipping capacity necessary to serve their customers." RILA Comments at 3.

Commission does have jurisdiction over 46 U.S.C. 41104(a) violations, breach of contract claims are not within the Commission's jurisdiction.

Other shippers and trade associations expressed similar misgivings about the proposed scope of 46 U.S.C. 41104(a)(10) and the urgent need for a solution to refusals that arise past the negotiation stage, i.e., after the parties have (or ostensibly have) a contract to transport the cargo. The U.S. Dairy Export Council (USDEC) termed these concerns "anti-backsliding considerations" and explained why these post-negotiation issues urgently need to be addressed and how these concerns relate to 46 U.S.C. 41104(a)(10) restrictions on unreasonable refusals to deal or negotiate. USDEC Comments at 3-4. As it explained:

> Negotiations between shippers and carriers are functionally intended to facilitate the international carriage of goods on an ocean vessel. The rule should not permit carriers to negotiate for vessel accommodations, only to have those bookings get rolled, delayed or cancelled. Disruptions to vessel schedules are understandable, but should a pattern emerge where negotiated vessel space accommodations are regularly unreliable, that should raise questions at the FMC about the intent and purpose of the negotiations. Compliance on negotiating for vessel space should be done in good faith and not solely as a means of achieving compliance without affording the service.

Id. at 4.

The International Dairy Foods Association (IDFA) raised the same concerns and termed them "de facto" unreasonable refusals to deal. IDFA Comments at 2. IDFA listed multiple examples of de facto unreasonable refusals to deal, such as:

> skipping or cancelling services to certain ports; changing the port of loading; calling on such ports but not alerting exporters to their presence; poorly communicating when vessel schedules change; providing windows for loading that are impractical due to their short length; blank sailings without providing sufficient notice to exporters; not pre-positioning containers inland close to export customers; providing inaccurate and unreliable vessel, shipment and tracking information; and continually rolling export bookings, which amounts to an effective denial of service.

Id. at 2-3. IDFA also emphasized the untenable consequence of these de facto refusals — "a shipping environment where there is no schedule reliability which harms the competitiveness of U.S. export in oversea markets." *Id.* IDFA also stated that its members have reported that as frequently as 90-100% of the time, their bookings have been rolled or canceled. *Id.*

IDFA proposed that the Commission address these problems by declaring the following actions presumptively unreasonable under section 41104(a)(10): (1) a blank sailing with less than six weeks' notice; (2) not providing at least 72 hours' notice to load a vessel; (3) skipping, suspending, or discontinuing services to ports or changing the port of loading despite export demand at such ports; (4) not clearly communicating or providing consistent, accurate information directly to cargo owners when ships come into port or vessel schedules change; (5) rolling a valid export booking; and (6) refusing a booking for perishable cargo. *Id*. at 4 and 7. Most of these actions could not logically be considered part of the negotiation stage since in most cases, they would occur after shipper and carrier have negotiated a deal.

IDFA criticized the proposed rule as inappropriately "preoccupied with solving unreasonable refusals to deal in specific negotiation and discussion contexts," which it contends "is not the heart of the problem." *Id.* IDFA states that "[i]n order to address the bulk of the unreasonable refusal to deal issue, a Commission rule must target the VOCC [vessel-operating common carriers] policies and procedures that systematize and operationalize the de facto unreasonable refusal to deal or negotiate with cargo owners." *Id.* at 7-8. The Commission acknowledges that these concerns are legitimate and proposes broadening the scope of this rulemaking to encompass section 41104(a)(3) as the best solution. The revised rulemaking will globally address unreasonable refusals prohibited under Section 41104(a) that hamstring shippers' attempts to transport their cargo to their overseas buyers.

The American Chemistry Council (ACC) raised the same concerns and pointed out that if the NPRM only covers contract negotiations and discussions between carriers and shippers, it will "leave[]a gaping hole that will continue to allow unreasonable conduct by" ocean common carriers. ACC Comments at 2. To emphasize that point, it lists numerous practices "that amount to an effective refusal to deal that the NPRM does not appear to address." *Id.* The examples ACC recited include providing insufficient vessel space allocations; calling on ports but not alerting exporters to their presence; poorly communicating when vessel schedules change; providing

insufficient windows for loading a vessel; blank sailings without providing sufficient notice to exporters; and repeated rolling of export bookings. *Id*. at 3-4.

The American Cotton Shippers Association (ACSA) highlighted the same concerns about carriers not loading their containerized export cargo. ACSA Comment at 6-7. ACSA submitted numbers showing their calculations and comparisons on warehouse pickup performance in terms of cotton bales shipped and bales not picked up between August 2019 and June 2021. *Id*. at 7. The Commission has not independently verified ACSA's statistics but notes that they reflect the same general concern raised by others, namely that unreasonable refusals to deal or negotiate is only a part of the export problem that OSRA 2022 was meant to address. *See also*, Comments from Bass Tech International at 1-2 (noting other ways, besides outright refusal to deal or negotiate, that common carriers use to avoid providing service and stating that it "is critical that the NPRM addresses these types of conduct as well"); Comments from Members of Congress at 1 (identifying service cancellations at ports that agricultural exports rely on, like the Port of Oakland, as concerns to be addressed).

B. Distinguishing between negotiation refusals under 46 U.S.C. 41104(a)(10) and execution refusals under 46 U.S.C. 41104(a)(3).

Comments from the USDEC highlight the fallacy of presuming that as a practical matter, it will always be feasible to draw a discernible line between unreasonable refusals covered by section 41104(a)(10) as distinguished from those covered by section 41104(a)(3). *See* USDEC at 2-4. USDEC explained how communications between shippers and carriers typically flow in the real world. As it explained, shippers' and carriers' negotiations are not always neatly confined to rates and general terms of service. *Id.* Rather, negotiations may cover all

> matters related to the shipment, such as the cost of the shipment, the volume of the shipment (both in terms of total TEU containers as well as weight), the timing of vessel accommodations, origin and location of shipments, whether the shipment involves any intermodal carriage, the inclusion of equipment (containers, reefers, chassis), among other details.

Id. at 2-3.

What these concerns mean as a practical matter is that discerning whether a common carrier has unreasonably refused cargo or vessel space accommodations is not a simple binary question of determining what prevented the shippers' cargo from actually being loaded aboard an outbound vessel. That question may be bound up with an unbroken series of interactions and communications that cannot always be neatly separated into the negotiation stage (covered by 46 U.S.C. 41104(a)(10)) and the execution stage (covered by 46 U.S.C. 41104(a)(3)) of the parties' interactions. *Id.* at 3-4. USDEC suggests the Commission address this concern by defining "whether negotiation can occur on only limited aspects of this scope, or if it must encompass all the aspects of a vessel accommodation." *Id.* Instead of broadening the scope of section 41104(a)(10) as USDEC suggests, the Commission proposes defining unreasonable refusals covered by section 41104(a)(3) in the same rulemaking. For reasons already discussed, this proposed approach is superior to a bifurcated rulemaking that defines the two provisions separately. Further, the Commission proposes to define what constitute unfair or unjustly discriminatory methods within the meaning of section 41104(a)(3) in a separate rulemaking pursuant to section 7(c) of OSRA 2022.

3. Reasonableness Factors

Most commenters addressed the proposed reasonableness factors with mixed support for the existence of a documented export strategy or policy and the scope of legitimate transportation factors.

a. Documented Export Policy

The concept of having a documented export policy as stated in § 542.1(b)(2)(i) of the NPRM was generally supported by ACSA, ACC, CBA, IDFA, USDEC, and DOJ. Nearly all commenters in support provided additional context for how export strategies should be structured. ACC commented that the Commission should make it clear that export strategies should include provisions that facilitate exports, not just maintain the status quo. ACC at 4-5. ACC also asserted that carriers should report every year. ACC at 5.

Multiple commenters suggested that a more specific definition of export strategy should be provided. *See* CBA at 2, DOJ at 5. IDFA further recommends mandatory standards for an export strategy and regulations concerning failure to adhere to such standards. IDFA at 9-11. USDEC recommended that carrier export strategies be made public. *See* USDEC at 3.

PMSA and WSC opposed the proposed export strategy component for a variety of reasons. WSC stated that including an export strategy is equivalent to requiring such a strategy and the Commission lacks the authority to do so. WSC at 3. They further asserted that the Commission failed to explain how such a document would be relevant and to consider that they are sensitive business documents. WSC provided additional information it believed supports its assertion that the Commission lacks the authority to require such a document. WSC at 4. WSC also asserted that this proposed requirement will result in the lack of a document being interpreted as a per se indicator of unreasonableness, resulting in a disadvantage to the carrier. It further asserted that the lack of a required "import strategy" means that the proposed rule would not equally apply to both imports and exports, contradicting an assertion included by the Commission in the preamble. It added that this criticism should not be interpreted as suggesting that an "import strategy" document should be required. WSC at 7. Finally, it asserted that the lack of specifics on how the export strategy will be used further supports WSC's view that such a document should be stricken from the list of factors and that any information in such a document would not be able to be made public.

Similarly, PMSA contended that the NPRM ignores imports, and as the Commission has no authority to require an import or export strategy from ocean common carriers, it cannot use the existence, or not, of such a strategy as a factor in the reasonableness analysis. PMSA at 1. It further contended that only shippers regard cargo as imports or exports and ocean carriers simply regard freight as cargo, regardless of the direction of trade.

The Commission notes the concerns of WSC that export strategies are constantly evolving as the nature of international trade changes and for this reason does not define an

exhaustive list of items that must be included in an export policy but instead identifies certain elements that would be helpful in determining reasonableness. If an ocean common carrier also wanted to provide an import policy to help establish how a refusal to deal is reasonable, the Commission would consider that information. And while the Commission will not adopt the IDFA recommendation that the Commission directly compare a carrier's export strategy to key performance indicators, the Commission notes that there are many sources of data on the amount and type of freight that carriers transport for both imports and exports which provide insight into whether the carrier's behavior aligns with its purported policy or strategy.

While WSC is concerned that the lack of an export strategy might be considered a per se indicator of unreasonableness, that is not the intent behind the inclusion of this provision. The intent is to provide carriers with the opportunity to document that their actions align with a documented export policy. And while both WSC and PMSA comment that no similar documentation was requested for imports, the Commission notes that there are few carriers who would need to rely on such a document to provide evidence that they intend to serve the U.S. markets when their ships are already visiting U.S. ports. On the other hand, a cursory glance at the continued decline in containerized exports carried by some ocean common carriers raises the question about the carriers' operations concerning export trades. Further, while PMSA asserts that carriers do not consider exports and imports as separate types of cargo, there is ample evidence in comments from the public, including WSC, that they do. *See, e.g.*, CMA CGM at 2; AgTC at 2; RILA at 2-3. In addition, PMSA's assertion in this regard ignores the existence of exporters, such as USDEC and NHC. In this SNPRM, the Commission has newly proposed revisions on the use of export policy to show what type of information from an existing export policy may be useful in establishing that a refusal to deal was reasonable. In § 542.1(b)(1), the Commission is proposing a definition of "documented export policy." Also, the Commission is proposing extensive revisions to § 542.2(d) by revising the burden shifting framework found in the NPRM (this framework applies even if it is not included in the regulatory text) and adding a

proposed requirement to have ocean common carriers follow and submit to the Commission on a yearly basis a documented export policy. It is noted that it is possible that an export policy will have different applications in different situations. An export policy is a long-term document, but it can shed light on what an individual ocean common carrier's best business practice would generally be and whether it was adhered to in an individual case. An export policy can also address import concerns given that the two are interconnected. Proposing a requirement to submit a documented export policy to the Commission pursuant to its authority under 46 U.S.C. 40104 is an important part of monitoring the industry for unreasonable behavior vis-à-vis exports in an effort to address those concerns. Also, in § 542.1(d)(1), the Commission identifies what type of information would be required to be included in a documented export policy that would help the Commission determine whether an ocean common carrier's conduct in a specific matter aligns with their general policies and thus acted reasonably.

b. Legitimate Transportation Factors

The proposed inclusion of legitimate business factors as one of the reasonableness factors was opposed by the majority of commenters. Two commenters expressed concerns that legitimate business factors would be used to justify rejecting entire classes of cargo, such as hazardous materials. NACD at 3 and NITL/ISRI at 9-10. While WSC favored the use of legitimate business factors, it objected to a reference to the "character of the cargo" as vague (87 FR 57677) and suggested removing it from the final rule (WSC at 11). The Commission clarifies that this reference is not intended to allow ocean common carriers to wholesale refuse to deal or negotiate with respect to carriage of certain categories of cargo, such as hazardous materials. The Commission further notes that the definition proposed in the regulatory text does not include "character of the cargo." This SNPRM does revise the definition of transportation factors to focus the scope more squarely on vessel operation considerations.

Multiple commenters worried about including profit or revenue as a legitimate business factor. AgTC cited including revenue factors as part of transportation factors will create a

"loophole" for carriers. AgTC at 4-5. Likewise, several commenters suggested dropping profit and business decisions or strategies from the list of legitimate factors. *See* BassTech at 3; IDFA at 9-11; IFPA at 1; NITL/ISRI at 10. CMA CGM stated that profitability and legitimate business decisions must be factors. CMA CGM at 2. WSC suggested adding business decisions to the regulatory text. In its view, the scope of business decisions would include past poor performance from the shippers, changing port calls due to blank sailings or other factors, and balancing import and export customer needs. WSC at 9-11. Given the thoughtful and varied comments received on the concept of reasonable business decision-making, this SNPRM removes the general concept from the definition of unreasonableness. Information on business decisions relevant to establishing a reasonable refusal to deal, however, would still be relevant in the Commission's analysis. The SNPRM does not preclude considerations that an ocean common carrier can present when articulating its justification for refusing to deal.

The Commission notes that in its proposed regulatory text at § 542.1(b)(1) of the NPRM, the term "transportation factors" would encompass "the genuine operational considerations underlying an ocean common carrier's practical ability to accommodate laden cargo for import or export, which can include, but are not limited to, vessel safety and stability, scheduling considerations, and the effect of blank sailings." The Commission notes the disconnect between this language and language in the preamble that, "[a]n ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with its business development strategy." In this SNPRM, at § 542.1(b)(2), the transportation factors have been changed and the Commission now proposes to focus those factors on considerations related to vessel operations. Some relevant business decisions do need to be explained as part of an export policy. Business decisions that should be explained as part of an export policy include providing a justification for why a refusal to deal by an ocean common carrier is reasonable when there was a blank sailing that affected the ocean common carrier's

ability to take on a shipment to the detriment of the shipper. Also relevant are business decisions that show that the ocean common carrier offered alternative remedies or assistance to the shipper after refusing to deal or negotiate for vessel space accommodations.

The Commission further notes, however, profit and business factors may be present when engaging in negotiations, but these factors would have to be considered alongside other factors presented when the Commission is determining what the true driving factor is for refusing to deal in a given case and whether that driving factor is reasonable.

FIATA noted a concern with the characterization of ocean common carriers' operational decisions, particularly with request to canceled sailings and capacity decisions; namely, that the final rule needed to provide clarity around when an ocean common carrier's operational decisions, particularly with respect to canceled sailings and capacity decisions, will result in a finding of an unreasonable refusal to deal or negotiate. FIATA at 1. WSC explained that its list of business decisions includes schedule changes, including canceled sailings. WSC at 11. The Commission notes the concern from FIATA that since carriers control capacity, they might strategically alter capacity to refuse to deal or negotiate. Canceled sailings or schedule changes are typically driven by decreased demand, port congestion, or changes in service by a vessel sharing partner. The Commission notes that evidence that an ocean common carrier changes schedules for other purposes would result in those changes not being considered a legitimate transportation factor under § 542.1(b)(2)(iii) of the NPRM. This SNPRM proposes changes to the transportation factors definition at § 542.1(b)(2) that addresses these concerns.

ACC and IDFA suggested that shippers' lost sales be considered a reasonableness factor. ACC at 4; IDFA at 8. As noted elsewhere, the rule allows the Commission to consider any relevant factor in determining whether a refusal to deal or negotiate was unreasonable. The focus of the definition of reasonableness, however, is on the ocean common carrier's conduct rather than the impact on the shipper. Generally, however, transportation factors relate to the

characteristics of the vessel, not the status of the shipper.[4]

Finally, commenters addressed the key role of contract carriage in ocean transportation and expressed concerns that the rule will interfere with contract carriage. DOCE at 5-6, WSC at 14. The Commission notes that service contracts are key to ocean carriage and the intent of the rule is not to dictate a return to carriage under tariff, nor is it intended to interfere with the substance of service contracts reached between parties. Presumably, an enforceable service contract would not allow for the type of conduct that the Commission would be likely to consider an unreasonable refusal to deal or negotiate, and if a service contract is materially breached, the parties have remedies that are beyond the Commission's purview. The Commission also recognizes that, as stated in the preamble, its "role is not to ensure all interested parties get the same deal," and understands that "me too" contracts were abolished in the Ocean Shipping Reform Act of 1998. Fully cognizant of the privilege that private parties may enter into their own service contracts, the Commission means to clarify here that, regardless of contract status, an ocean common carrier may not effectively bar a shipper, including one without a service contract, from having direct access to ocean common carriage by failing or refusing unreasonably to deal or negotiate the terms of such carriage. This can include an ocean common carrier's failure or refusal to timely provide a rate quotation upon request or to refuse to provide required ancillary intermodal services, if available.

3. Elements

Pursuant to OSRA 2022 and Commission precedent, the Commission proposed that complainants would be required to meet three elements to establish a violation for unreasonable refusal to deal or negotiate. As indicated in the NPRM, the elements would apply in cases where the allegation relates to vessel space accommodations by an ocean common carrier. As proposed, the elements were derived directly from the statutory text established in OSRA 1998 and are: (1)

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[4] *See, e.g.*, *Credit Practices of Sea-land Serv., Inc., & Nedlloyd Lijnen, B.V.*, No. 90-07, 1990 WL 427463 (F.M.C. Dec. 20, 1990); *Dep't of Def. v. Matson Navigation Co*., 19 F.M.C. 503 (1977).

the respondent is an ocean common carrier under the Commission's jurisdiction; (2) the respondent refuses to deal or negotiate with respect to vessel space accommodations; and (3) that the refusal is unreasonable. *See* 87 FR 57679.

Commenters were generally supportive of the proposed elements, *see, e.g.*, BassTech at 1; MICA/NAMI at 2; NFI at 2, although some specific comments expressed concerns regarding the impact of the rule in general and meeting the required elements. As noted earlier, DOJ worried that satisfying the "refusal to deal" and "unreasonable" elements would be difficult. DOJ at 4-5. While NHC viewed the proposal as falling short of the objective of ensuring the carriage of export containers, *see* NHC at 1, most other comments regarding the proposed elements sought a lengthier or stronger definition of "refusal" and "unreasonable," but did not criticize the elements as a whole. *See* MICA/NAMI at 3-4; NITL/ISRI at 6-7, 13-14; RILA at 1, 5 (suggesting additional clarifying language for the proposed regulatory text for 46 CFR 542.1(c)(2)); Tyson at 1. This SNPRM includes changes to the definition of unreasonable to include a non-exhaustive list of scenarios of unreasonable conduct and to propose the removal of business decisions from the definition. Regarding PMSA's concerns that the elements of the proposed rule may impact individual contract negotiations addressing price, volume, timing, payment, delivery, prior experiences, dual commitment contracts and all other factors that are addressed, *see* PMSA at 1, the Commission notes that this rule does not dictate the contractual terms that may be reached between an ocean common carrier and a shipper.

4. Definitions

As the Commission noted in its preamble discussion for its proposal, neither the Shipping Act, as amended, nor OSRA 2022 define the phrase "vessel space accommodations," and this phrase has not been interpreted in prior Commission matters. Therefore, the Commission proposed to define "vessel space accommodations" generally as space provided aboard a vessel of an ocean common carrier for laden containers being imported to, or exported from, the United States. In this SNPRM, the Commission also clarifies that "vessel space services" – *i.e.*, the

services necessary to access or book vessel space accommodations – are included in the definition of "vessel space accommodations." This definition continues to be based on the common meaning of the words in the phrase as applied in ocean shipping.

Because the phrase "refusal to deal or negotiate" does not lend itself to a general definition, the Commission proposed using a case-by-case evaluation. This SNPRM proposes a revised definition of unreasonableness after further consideration of the comments received. Additionally, the proposed definition now includes a non-exhaustive list of examples of unreasonable conduct.

a. Vessel Accommodations

The Commission received several comments regarding its proposed "vessel space accommodations" definition. Comments were generally supportive, with a few suggestions and critiques. In broad summary, the comments urged the Commission to broaden its definition of "vessel space accommodations" to include access to vessel space accommodations, meaning the services to book vessel space, the equipment to obtain vessel space, and other ancillary services that would impact exporters' ability to obtain vessel space. While some comments supported the proposed definition but urged expansion, others withheld support due to the definition's perceived narrow interpretation.

First, the National Industrial Transportation League (NITL) and Institute for Scrap Recycling Industries (ISRI) asked that the Commission broaden its definition of vessel space accommodation to include "vessel services." NITL/ISRI at 7. Without the expansion, the NITL and ISRI contended that the proposed rule "fails to adhere to the intent of Congress." *Id.* Similarly, the Agriculture Transportation Coalition (AgTC) says the rulemaking and the above definition is unable to "recognize the various means the carriers decline to carry export cargo." AgTC at 1. While AgTC did not critique the "vessel space accommodations" definition specifically, it deliberately used the phrase "export cargo" instead of "vessel space accommodations" when discussing unreasonable refusals to deal or negotiate. Vessel space

accommodation and export cargo hold different meanings. The Commission interprets this deliberate use of "export cargo" as a suggestion to revise the vessel space accommodation definition to refer specifically to "export cargo." As explained elsewhere, this proposed rule applies to both import and exports. The differences between the "vessel space accommodations" definition and "cargo space accommodations" will be addressed below.

Second, the International Federation of Freight Forwarders Associations (FIATA) asked the Commission to clearly define vessel space accommodations to give context to "operational decisions" by ocean common carriers that result in a refusal to deal or negotiate. FIATA at 1. It listed "operational decisions" as common carrier actions to "carry out blank sailings, withdraw or reposition capacity, and impose peak season surcharges." *Id.* BassTech also asked the Commission to revise the proposed definition of "vessel space accommodation." BassTech at 1. Although it agreed with the Commission's proposed definition, it asked the Commission to consider the processes and practices that would obstruct a shipper from obtaining vessel space. *Id.* at 2.

Third, related to the Commission's proposed definition of vessel space accommodations, the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) suggested that non-vessel-operating common carriers (NVOCCs) be excluded from the rule because they do not control vessel space accommodations. NCBFAA at 2–3. It cited the inability of these entities "to control vessel space accommodations." *Id.* at 2. The Commission recognizes the role NVOCCs play and concur that their exclusion is appropriate as they do not control vessel space accommodations. Thus, like the proposed rule, this SNPRM only applies to ocean common carriers.

The Commission notes the potential hardships a narrow reading of "vessel space accommodations" would impose on certain industry members. In the Commission's view, services that would impact the actual acquisition of a "vessel space" could also be used by ocean common carriers to frustrate shippers and amount to an "unreasonable refusal to deal or

negotiate." Therefore, the definition of "vessel space accommodations" necessarily implies that "vessel space services," i.e., the services necessary to access or book vessel space accommodations, are included. Thus, this SNPRM adds a sentence to the definition to acknowledge that vessel space services are included.

5. Shifting burden from complainant to ocean common carrier

The Commission's initial proposal also set forth a framework for an ocean common carrier to establish that its efforts to consider an entity's proposal or efforts at negotiation were done in good faith based on the criteria above. Once a complainant (or the BEIC) has established a prima facie case for each of the three elements above, the ocean common carrier will have the burden of production to show or justify why its refusal was reasonable. However, the ultimate burden of persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable. Further, the proposed rule included a rebuttable presumption of unreasonableness for those situations where an ocean common carrier categorically excludes U.S. exports shipments.

a. Burden-Shifting

The Commission received various comments with regard to the proposed burden-shifting regime in the NPRM. Three entities (ACSA, NACD, NFI) supported the burden-shifting regime laid out in the NPRM without further comment. ACSA at 10; NACD at 4; NFI at 2. Three entities (AgTC, CBA, IDFA) commented that the ultimate burden should be on the ocean common carriers, not the shippers, due to the ocean common carriers' superior access to real-time data on space availability. AgTC at 5-6; CBA at 2; IDFA at 3-4. CMA CGM commented that Congress did not expressly direct the Commission to incorporate a burden-shifting regime as part of the proposal, as it did with regard to charge complaints. CMA CGM at 2-3.

Other entities supported the burden-shifting regime, but with caveats. AgTC and WSC supported the approach but pointed out that the burden-shifting explanation in the preamble is not in the proposed regulatory text. AgTC at 5; WSC at 15. BassTech supported the proposal so

long as the carrier's evidence can be challenged (which, as noted below, would occur in Step 3). BassTech at 3-4. MICA/NAMI suggested that the Commission should also consider whether the carrier has actually engaged in good-faith communications and negotiation. MICA/NAMI at 3. NITL/ISRI strongly supported burden-shifting but did not want a carrier's self-certification to be given dispositive or outsized weight (this SNPRM proposes the deletion of the self-certification provision). NITL/ISRI at 14-15. RILA broadly supported burden-shifting but asked it to be more closely aligned with the charge complaints procedure found in 46 U.S.C. 41310(a) and (b). RILA at 1, 4. Several entities (ACSA, CBA, IDFA) sought the addition of time limits on carrier responses, especially in cases dealing with refusals of perishable goods. ACSA at 10-11; CBA at 3; IDFA at 4.

The Commission has given careful consideration to the comments received on its proposed burden-shifting approach. As a preliminary matter, the Commission notes that this SNPRM proposes to continue using the process followed in cases arising under the Administrative Procedure Act (APA). The initial burden of production is with the complainant (Step 1). If the complainant can satisfy its initial burden of producing evidence sufficient to make out a prima facie case of a violation, the burden then shifts to the respondent to produce evidence sufficient to rebut the complainant's prima facie case (Step 2). But the ultimate burden of persuading the Commission always remains with the complainant (Step 3). *See* 46 CFR 502.203; 5 U.S.C. 551-559. Although a given practice could be treated as per se unreasonable, the occurrence of which would suffice to create a prima facie case of an unreasonable refusal to deal and trigger the ocean common carrier's burden to produce evidence that the refusal was not unreasonable and thus move the case directly to Step 2, the complainant or BEIC would still have to persuade the Commission in Step 3 that the refusal was unreasonable.

Congress tasked the Commission with defining whether a particular action is an unreasonable refusal to deal or negotiate with respect to vessel space under 46 U.S.C. 41104(a)(10). It did not prescribe a particular method for the Commission to follow in

developing this definition and it did not proscribe the Commission from using any particular approach. Thus, the Commission adopts the existing process for APA cases and notes in proposed § 541.2(k) that the standard is based "in accordance with applicable laws" such as the APA. The Commission also proposes to include Step 3 so that the full standard is available in the regulatory text.

As to the additional suggested modifications of the proposed burden-shifting approach, the Commission does not adopt them at this time. The Commission believes that the approach laid out in this SNPRM sufficiently expresses its expectations as to what is required and provides a reasonable approach that will effectively produce the information needed to allow the Commission to decide whether a given matter involves an unreasonable refusal to deal or negotiate.

Regarding the inclusion of specific aspects such as the application of time limitations in the context of cases involving perishable goods, the Commission may consider the inclusion of such conditions within a given case as appropriate but has opted not to mandate such limits consistent with our case-by-case approach. Regarding suggestions that the procedure be modified to more closely align with that which Congress detailed for charge complaints under 46 U.S.C. 40310, the Commission also does not adopt such an approach because section 40310 on charge complaints does not apply to refusal to deal cases. Similarly, the evidence produced by the ocean common carrier in making its case that refusal to deal or negotiate was not unreasonable is subject to challenge by the opposing party, and all evidence, as in any contested case, will be subject to scrutiny by the Commission. 5 U.S.C. 556(d).

b. Rebuttable Presumption

A number of commenters responded to the Commission's proposed rebuttable presumption approach. For the most part, commenters generally favored the Commission's proposal, with some strongly favoring it, *see* ACSA at 5; MICA/NAMI at 2; Tyson at 1, others offering general support, *see* NCBFAA at 2; NFI at 2; RILA at 1; and others offering suggestions

along with their support. *See* NITL/ISRI at 14; PMSA at 3; WSC at 16. One commenter opposed the approach (and the proposal as a whole) as being insufficient in protecting exporters from being denied service whenever there is available cargo space on a vessel and urged that the proposal be revised to limit exceptions and clearly define when it is unreasonable for carriers to deny service. NHC at 1-2.

With respect to those commenters who offered specific suggestions for the Commission to consider, NITL/ISRI suggested that the regulatory text should include language specifying that a rebuttable presumption of unreasonableness applies in those cases where an ocean common carrier categorically excludes U.S. exports from its backhaul trips from the United States. NITL/ISRA at 14. PMSA offered a number of specific factors for the Commission to use in establishing a rebuttable presumption of reasonableness: (1) the presence of Federal, state or local/port policies that advocate the prioritization of the export of empty containers either through stowage plans or through the use of sweeper vessels; (2) prior experience with individual cargo owners who have engaged in unlawful or improper behavior (*e.g.*, misdeclaration of cargo or shipment of hazardous cargo that has caused or threatened the safety of a vessel and/or that has given rise to adverse governmental action, penalties, fines or other liability); (3) a history of late or nonpayment of services; (4) whether viable alternatives exist, whether through other VOCCs or via NVOCCs, Ocean Freight Forwarders or through Shippers' Associations; (5) the failure to provide contracted amount of cargo or to meet minimum quantity commitments or a history of falling down (i.e., cancellation by either party) or making ghost bookings; (6) changes in vessel rotations due to inland congestion or other factors beyond the carrier's control; (7) whether the export customer is prepared to pay prevailing market freight rates for shipments together with all reasonable charges associated with the destination; and (8) whether the export destination is one with sufficient infrastructure to handle the return of equipment (containers, chassis) such that a return shipment and/or repositioning can be accomplished at a reasonable time and cost. PMSA at 3.

The WSC suggested that the Commission modify the proposed regulatory text for the shifting of the burden of production to emphasize that the burden of persuasion ultimately remains with the complainant or BEIC:

> A complainant (or the BEIC) may seek to establish a violation of 46 U.S.C. 41104(a)(10) by producing sufficient evidence to establish a prima facie case of a violation. If a complain[ant] (or the BEIC) establishes a prima facie case of a violation, the burden of production shifts to the ocean common carrier to rebut the complainant's [or the BEIC's] evidence and justify that its actions were reasonable. Once the ocean common carrier has fulfilled its burden of production, the burden of persuasion rests with the complainant (or BEIC) to prove its case.

WSC at 16. The Commission is proposing to include similar language in § 541.2(k)(3).

Regarding the specific suggestion offered by the NITL/ISRA, the Commission notes that the regulatory text proposed in this SNPRM is sufficient to cover those situations where an unreasonable refusal to carry U.S. exports occurs. The inclusion of the specific example of a carrier's exclusion of U.S. exports from a backhaul trip is unnecessary given the criteria for evaluating whether an ocean common carrier's action is unreasonable. While PMSA's specific examples are illustrative of the types of factors that the Commission may consider when evaluating a specific claim, including these examples within the regulatory text is also unnecessary for similar reasons. However, the Commission notes that this rulemaking does not restrict the ability of ocean common carriers to reposition empty containers, including through use of sweeper vessels. As for the WSC's suggested rewriting of the proposed regulatory text for the shifting of the burden of production, the Commission is proposing language that shows that the burden of persuasion lies with the complainant within the regulatory text.

6. Certification

The proposed rule also sought to include a mechanism for an ocean common carrier to justify its actions through means of a certification. Although the proposal did not require a certification for this purpose, the Commission indicated that it was considering whether to make certification by a U.S.-based compliance officer mandatory. The Commission also noted that any justification must be directly relevant and specific to the case at hand and further noted that

information or data supporting generalized propositions would not be helpful in determinations of reasonableness for a specific case. Instead, a certification should document the ocean common carrier's decision in a specific matter, the good faith consideration of an entity's proposal or request to negotiate, and the specific criteria considered by the ocean common carrier to reach its decision. The Commission explained that certification in this context meant that an appropriate U.S.-based representative of the ocean common carrier attests that the decision and supporting evidence is correct and complete. An appropriate representative can include the ocean common carrier's U.S.-based compliance officer. As explained above, however, certification by a compliance officer that a refusal to deal was not unreasonable, and the evidence underlying the certification, are elements that the Commission will consider in the context of deciding the case. The Commission will receive evidence that is relevant and will give it the appropriate weight. Certification by a compliance officer would be but one factor; it does not automatically end the case in favor of the ocean common carrier.

Some commenters supported the proposed certification. *See* BassTech at 3-4 (supported so long as the certification can still be disputed), DOJ at 5; MICA/NAMI at 2; NCBFAA at 2; NFI at 2; Tyson at 1 (supporting MICA/NAMI comments). Others raised concerns. *See* NACD at 4 (indicating that while it did not oppose the use of an optional certification by carriers it harbored concern over that certification being given undue weight in determining reasonableness); NITL/ISRI at 15 (expressing concern over undue weight being afforded to carrier decisions when evaluating reasonableness under the proposed certification approach); WSC at 15-16 (suggesting that (1) the proposed certification method be only one of a variety of permissible ways for an ocean common carrier to demonstrate reasonableness, (2) ocean common carriers who do not certify not be prejudiced, (3) the Commission explain the probative value of certifying, and (4) the Commission explain why it is considering making certification by a U.S.-based compliance officer necessary). Still other commenters expressly opposed allowing any self-certification by carriers. *See* IDFA at 10-11 (opposing carrier self-certification and

suggesting that certification be continuous and overseen by an independent third party), NHC at 1-2 (generally critical of the proposal in its entirety).

After carefully considering these comments, the Commission has decided not to adopt a mandatory requirement that the certification be made by a U.S.-based compliance officer. Although self-certification could have provided some useful information, a robust and mandatory self-certification approach would require a more holistic and costly approach and the Commission finds it is not necessary at this time.

7. Other Issues

Finally, the Commission received a number of comments that did not fall within the categories already discussed. These comments covered a broad range of topics ranging from simply offering the commenter's expertise through further individualized discussions to help better understand the Commission's proposal (*e.g.*, Lanca at 1) to more in-depth suggestions falling outside the immediate scope of the proposal (*e.g.*, Tyson at 1-2 (suggesting that the Commission require carriers to provide accurate forecasting and updated information to ensure that shippers can position their shipments at port terminals within agreed-upon time windows, supporting greater transparency with respect to vessel capacity, loading timeframes, and vessel schedule changes that would impact contracted delivery times, and urging the Commission consider how it plans to address forthcoming changes to import rotation and the impact of these changes on port congestion)). Some of these issues are under consideration in the Maritime Transportation Data System project. *See* https://www.fmc.gov/fmc-maritime-transportation-data-initiative/.

AgTC and IDFA both commented that the proposal failed to deal with "de facto unreasonable refusals to deal" that are not the product of negotiations, but rather are dropped on the shipper by the carrier at the last minute. AgTC at 3; IDFA at 2-3. FIATA suggested that the Commission should address whether the rule applies to shipments of foreign cargo as long as there are some U.S. shipments involved in the same service contract. FIATA at 2. BassTech

appreciated that the status of the shipper is not a legitimate transportation factor sufficient to refuse a booking but expressed concern that a shipper's status could nevertheless be grounds for a refusal based on a reasonable business decision (*i.e.*, especially with regard to hazardous cargo). BassTech at 3. ACC believed that the proposed rule failed to consider the negative effect on the exporter of a refused booking. ACC at 2. CBA argued that there should be a national data portal or similar information technology infrastructure to allow all parties to have access to all the relevant booking and space-availability data. CBA at 3. CMA CGM commented that "me too" contracts were abolished in 1998 and parties must continue to be free to contract as they wish. CMA CGM at 2.

MICA/NAMI noted that difficulties in getting perishable cargo shipped has led to the loss of business for U.S. suppliers and enabled in-roads by competitors in Europe and Australia. MICA/NAMI at 2. They cited to export data showing blank sailings rose as chilled beef and pork exports to high-value markets declined. MICA/NAMI at 2. MICA/NAMI also pointed to insufficient information shared by ocean common carriers regarding vessel schedules and space availability as factors complicating the ability of shippers to identify alternate routes or means of transportation for their products. MICA/NAMI at 3. MICA/NAMI further noted that ocean common carriers often cancel meat and poultry export bookings up to the sailing date with no warning to shippers and that its member experiences with "failures to deal or negotiate" on detention and demurrage fees posed a major problem. MICA/NAMI at 3. They also urged that "[i]n cases where a carrier may be holding cargo until an invoice is paid regardless of its validity, the lack of a clear channel of communication to challenge the billing statement is unconscionable and should be addressed by the FMC" as part of this (and other) rulemakings. MICA/NAMI at 3.

As indicated elsewhere, this supplemental proposal addresses the criteria that the Commission will consider in evaluating whether there has been a refusal to deal or negotiate, which will occur on an individualized basis. The Commission appreciates the additional feedback provided regarding the field experiences shared by MICA/NAMI members. These

experiences will be considered as appropriate within the context of a given case. Also, some proposals may be outside the scope of this rule and/or better addressed by other Commission initiatives such as the Demurrage and Detention Billing Requirement rule, Commission's Docket No. 22-04, other future rulemakings or the Maritime Transportation Data System project.

NAM observed that ocean common carriers own and operate the ships (and often, the containers) used in ocean transit and noted that any enforcement measures should be directed towards those parties responsible for schedules and operational disruption. NAM at 2. NAM also generally noted that disruptions to the supply chain have a ripple effect and indicated that "[e]stablishing minimum notification thresholds for ocean common carriers as they plan strategic equipment movement and port calls would ease burdens for all shipping partners and enhance system-wide transportation supply chain reliability." NAM at 2. NAM also noted that the prominence of blank sailings and a rising propensity/apparent partiality of ocean common carriers to accept empty containers for profitability goals are linked to economic viability and competitiveness for U.S. manufacturers and encouraged the Commission to consider these factors in this rulemaking. NAM at 2-3.

The Commission acknowledges the disruptions noted by NAM and appreciates the concerns it raised with respect to the impacts these disruptions have on the overall supply chain. With respect to the factors noted by NAM regarding the evaluation of blank sailings, the Commission notes that the causes of blank sailings may vary, ranging from inclement weather, force majeure events, port congestion, vessel mechanical failure and a steep decline in demand. As a result, an individual ocean common carrier may not necessarily have control over the causes leading to blank sailings. While the impacts of these actions often lead to cascading negative impacts, the Commission's focus in the context of this rule is to address instances where ocean common carriers fail to mitigate the impacts flowing from blank sailings and other similar actions instead of actively working with the shipper to get alternative accommodations for the freight. In its evaluations, the Commission anticipates that it will consider the relevant facts

present in an individual situation to determine whether those actions by an ocean common carrier fall within the scope of the definition being set out as part of this SNPRM.

NCBFAA suggested that NVOCCs be excluded from the scope of the rule and described the supportive role that NVOCCs play in helping their customers navigate the complex ocean shipping industry by securing competitive pricing and favorable transportation routes by using the unique industry experience and relationships NVOCC have developed with ocean common carriers. NCBFAA at 2. NCBFAA emphasized that NVOCCs, unlike ocean common carriers, do not control vessel space accommodations. NCBFAA at 2-3. This SNPRM continues to restrict its application to VOCCs and does not include NVOCCs at this time. The Commission agrees that NVOCCs, unlike ocean common carriers, do not control vessel space accommodations.

NFI noted its members continue to face carrier-related shipping issues, including unpredictable dwell times; exponential increases in demurrage and other port-related costs; unfair and discriminatory commercial practices against shippers by oceangoing carriers and NVOCCs; shortages of containers, chassis, and labor; dramatically higher tariff/contract rates for oceangoing freight; and limited cold storage availability. NFI at 2.

The Commission acknowledges the presence of the issues noted by NFI but also notes that issues centering on container, chassis, and labor shortages are, in many cases, not carrier-related in origin. This SNPRM may not necessarily directly resolve each of these issues, but the Commission acknowledges that shippers face significant stresses stemming from supply chain congestion and also notes that these factors fall outside the scope of the Commission's task in defining what constitutes an unreasonable refusal to deal or refusal to negotiate.

NITL/ISRI asserted that blank sailing decisions must be reasonable to justify refusals to deal or negotiate, such as being based on a legitimate need to right-size supply based on demand rather than an action to reduce capacity to artificially inflate prices. NITL/ISRI at 11.

As noted previously, blank sailings may be attributed to a variety of causes that may fall outside of an ocean common carrier's control. The Commission notes that an ocean common

carrier's refusal to deal or negotiate within a blank sailing context must also be weighed against an ocean common carrier's efforts to mitigate the impacts on its customers when a blank sailing (or other similarly adverse outcome due to vessel schedule changes, including timing and port calls) occurs. Through this SNPRM, the Commission is setting forth the criteria that will be applied to determine whether a given refusal to deal or negotiate satisfies the condition of being unreasonable. Such a determination will necessarily include a consideration of the mitigating steps taken by an ocean common carrier to work with its shipper customers. The Commission will monitor these activities and act accordingly. Any future refinements to the Commission's regulations may be considered, if appropriate.

PMSA asserted that the proposal ignored imports even though imports are part of the overall network. PMSA at 1. It added that the proposal also did not mention the roles of shipper associations, NVOCCs, and ocean freight forwarders. PMSA asserted that these entities can collectively combine their bargaining power and provide export-related support to individual shippers and their respective roles should factor into any export policy or inquiry. PMSA at 2.

The September 2022 proposal specifically noted that the current statutory framework does not distinguish between U.S. exports or imports and that it would apply to both. *See* 87 FR 57674. The Commission recognizes that imports are an inherent component of the overall shipping network and the application of this rule to both imports and exports reflects that recognition. As to the roles of those entities who are not VOCCs, the Commission notes that while this SNPRM would apply only to VOCCs, the roles of other entities who play a role in potential Shipping Act violations would be addressed in the context of the appropriate statutory provisions applicable to those violations, such as those provided under 46 U.S.C. 41102 and 41104, and the Commission will evaluate those violations as appropriate.

RILA urged the Commission to strengthen the language of its proposal, particularly with respect to its applicability to conduct occurring in the context of an existing service contract relationship to help ensure that the rule addresses the concerns and real-world experiences of

U.S. importers and exporters. RILA at 1. RILA also emphasized that the Commission should account for the circumstances and criteria relevant to U.S. importers in addition to exporters. RILA at 2. It noted that many U.S. importer plans were disrupted when VOCC contract partners abruptly stopped providing cargo space for which importers had contracted, thereby forcing them onto the spot market and its accompanying higher rates. RILA at 2.

The Commission assumes that in those instances where a service contract already exists between an ocean common carrier and a shipper, a refusal to deal or negotiate would be addressed within the context of the provisions of the agreement made between those parties and the remedies afforded when there is a breach of contract. However, it is possible that there are circumstances in which a contract is silent on what to do if there is a refusal to deal or negotiate within the bounds of the contractual relationship. The Commission is interested in comments identifying those situations where a contract does not address how a refusal to deal with respect to vessel accommodations would be remedied.

In addition to the issues noted earlier, Tyson stated that the proposed rule would enable the Commission to ensure carriers are "providing a sound business rationale for either failing to accept a booking request or failing to fulfill an existing booking agreement." Tyson at 2. It added that changes are needed "to ensure the flow of information is balanced and allows each party, both carriers and shippers, to have fair and informed discussions regarding vessel space." Tyson at 2.

The Commission acknowledges the importance of ensuring that a sufficient information flow exists between ocean common carriers and shippers regarding vessel space, but this particular issue falls outside the scope of this rulemaking.

USDEC indicated that the regulations that the Commission adopts must emphasize consistency and to this end, suggested that the Commission establish a "consistency test" to help it assess whether a carrier is deviating from its past practices with respect to negotiating for vessel accommodations. USDEC at 3. It also suggested that the Commission consider what

information a shipper should retain to substantiate a violation under whatever regulation is adopted. USDEC at 3. In its view, the adopted regulations should result in increasing a shipper's ability "to effectively seek and secure vessel space accommodations in a competitive marketplace." USDEC at 3. With respect to the scope of negotiation, USDEC suggested that the Commission outline "whether negotiation can occur on only limited aspects" or all aspects of vessel accommodation such as the shipment's cost, volume, origin or location, and the involvement of intermodal carriage. USDEC at 3-4. USDEC suggested that the Commission consider adopting "anti-backsliding" provisions as part of its rule to ensure that carriers negotiate in good faith and to prevent carriers from engaging in a pattern of rolling, delaying, or cancelling shipper bookings. USDEC at 4. Additionally, USDEC asserted that the Commission should consider the impacts to shippers from a failure to negotiate on vessel accommodations within the context of potential enforcement actions and penalties for violations, impacts such as those on potential lost sales, diminished product values, additional shipping costs, and increased administrative costs. USDEC at 4-5. USDEC added that penalties imposed by the Commission should operate as a deterrent to willful or negligent violations of the regulations and be sizable enough to encourage corrective action by the carrier. USDEC at 5.

The Commission agrees that its rules should be applied consistently after a careful consideration of the facts presented in a given case. Regarding the types of information that a shipper should retain to substantiate a potential violation, each shipper should retain those materials that it believes clearly demonstrates that the violation being alleged has occurred. This information may differ based on the specific circumstances involved and may involve items such as (but not limited to) the documenting of attempts to reach an ocean common carrier and, if available, written communications indicating a refusal by an ocean common carrier. The scope of any negotiation will depend on the individual circumstances that present themselves and the Commission will evaluate those circumstances as they appear in a given case as appropriate. Consideration of an anti-backsliding provision to ensure that ocean common carriers negotiate in

good faith and do not engage in a pattern of disrupting shipper bookings, along with the setting of appropriate penalties for violations, are issues falling outside the scope of this specific rulemaking but may be considered in the context of other rulemakings as well as enforcement actions taken by the Commission.

III. Proposed Changes to the NPRM

The Commission is modifying aspects of the NPRM in this SNPRM after evaluating the proposed rule in light of the comments received. The SNPRM proposes to modify the definition of transportation factors to focus on vessel operation considerations. The SNPRM proposes a revision of the definition of the term unreasonable as well as includes a non-exhaustive list of examples of unreasonable conduct. This change is intended to provide a better idea of what types of conduct that Commission believes would generally be considered unreasonable. The Commission proposes to clarify that vessel space services were already included in the definition of vessel space accommodations and add a definition for cargo space accommodations as well. It also includes new text discussing the relationship between 46 U.S.C. 41104(a)(3) and (a)(10) and the elements required to establish violations of those provisions. Also, many comments expressed concerns about how business decisions would affect the overall analysis and thus this SNPRM changes how business decisions will be considered. This SNPRM then revises the voluntary export policy documentation language and proposes that ocean common carriers submit a documented export policy to the Commission once per year. It also revises the burden shifting framework to clarify that it applies even if it was not included in the rule and notes that the ultimate burden of persuasion lies with the complainant or BEIC. Finally, this SNPRM proposes to remove the voluntary certification provision as it is not necessary.

A. Section 542.1(b) – Definitions

In § 542.1(b), this SNPRM proposes a new definition of "cargo space accommodations," "documented export policy," and "sweeper vessel." It also proposes to modify the definitions for "transportation factors" and "unreasonable," and "vessel space accommodations." After careful

consideration of the comments, these proposed definitions now provide more clarification and specificity to allow parties to identify unreasonable refusal to deal more easily.

The proposed definition of "cargo space accommodations," like the definition of "vessel space accommodations" has not been interpreted in prior Commission matters. The two definitions are similar because both terms are part of concepts aimed at preventing similar conduct at different points of a shipping transaction. Because the term "cargo space accommodations" concerns situations where the parties have an existing relationship and/or already mutually agreed on terms and conditions via a booking confirmation, it is presumed that there is some evidence that negotiation for space aboard the vessel has already occurred. The Commission is interested in comments addressing if, in fact, that space has been agreed to at the time of a booking confirmation.

The new proposed definition of "vessel space accommodations" means space that is available aboard a vessel. Since 46 U.S.C. 41104(a)(10) prohibits unreasonable refusals during the negotiation stage--when the parties do not have an existing relationship and/or are initiating negotiations over terms and conditions of service, it is presumed that space has not yet been provided but that it may be available.

Both definitions, "cargo space accommodations" and "vessel space accommodations" should also include the concept of vessel space services. The Commission proposes to include in these definitions a reference to the services necessary to access or book vessel space accommodations. As some comments pointed out and is discussed above, services that would impact the actual acquisition of a "vessel space" could also be used by ocean common carriers to frustrate shippers and amount to an "unreasonable refusal to deal or negotiate." Thus, an unreasonable refusal to deal over the related services should also be included in the definition. These services could include for example, a shipper's access to a representative or a booking portal for vessel space, in summary any service impacting a shipper's ability to confirm its booking. It could also include services involving operational decisions that would impact a

shipper's already-confirmed booking for purposes of the definition of "cargo space accommodations."

The Commission is also proposing a new definition of "documented export policy." This proposed definition uses the term "policy" instead of "strategy" to better describe the type of information the Commission seeks. The proposal is intended to identify that the export policy must be in the form of a report and it must detail practices and procedures for U.S. outbound services. Pursuant to its authority in 46 U.S.C. 40104, the Commission seeks to require ocean common carriers to provide this information to the Commission on a yearly basis. It will use this information to monitor the industry for any unreasonable behavior with respect to refusals to deal or negotiate.

This SNPRM newly proposes a definition for "sweeper vessel." After reviewing the public comments, the Commission wanted to note that the use of sweeper vessels is a legitimate practice that is critical to the efficiency of our transportation system. This new definition, however, does specify that a sweeper vessel must be one exclusively designated for that purpose, i.e., a carrier that does not want to take exports cannot designate a vessel as a sweeper vessel in order to avoid certain shipments.

In the "transportation factors" definition, this SNPRM proposes to focus the definition on "vessel operation considerations" rather than the broader "genuine operational considerations" phrase that included factors other than those related to the safe operation of the vessel. For that reason, this SNPRM also proposes to remove the phrase "the effect of blank sailings" since this factor is not directly related to vessel safety or operational needs. Given the focus on operational considerations, the proposed definition now also includes "weather-related scheduling considerations" to ensure that scheduling within the control of the ocean common carrier is not used as a factor. The Commission also seeks to clarify with this SNPRM that transportation factors are not a way for a carrier to refuse to carry entire classes of cargo such as properly tendered hazardous cargo, heavier products or inland shipments. Instead, legitimate

transportation factors must exist, be outside the vessel operators' control and relate to the facts of a specific transaction or vessel.

The Commission also seeks to revise the definition of the term "unreasonable" by proposing an overarching definition that applies in both 46 U.S.C. 41104(a)(3) and 41104(a)(10) claims. In later sections of the rule, the SNPRM proposes revised factors and examples of unreasonable conduct that are non-binding and illustrate the type of conduct that Commission will consider unreasonable. The new proposed definition of the term "unreasonable" is ocean common carrier conduct that unduly restricts the ability of shippers to access ocean carriage services. The Commission believes this definition better aligns with the purpose of OSRA 2022 and the Shipping Act, as amended, as a whole.

B. Section 542.1(c) through (e) – Claims under 46 U.S.C. 41104(a)(3)

The Commission proposes adding new § 542.1(c) through (e) to define how a shipper can address unreasonable conduct by ocean common carriers that prevents shippers from obtaining space aboard vessels, when available, for their cargo pursuant to 46 U.S.C. 41104(a)(3). Section 542.1(c) proposes the elements of a claim. These elements are similar to those for a 46 U.S.C. 41104(a)(10) claim under § 542.1(f) given that both claims aim to prevent similar conduct at different points of a shipping transaction. As previously stated above, 46 U.S.C. 41104(a)(3) claims focus on those refusals that occur at the execution stage, after the parties reached a deal or mutually agreed on service terms and conditions via a booking confirmation subject to section 41104(a)(3).

Section 542.1(d) proposes a list of factors that the Commission may choose to consider in evaluating whether a particular ocean common carrier's conduct was unreasonable. Like in a claim under 46 U.S.C. 41104(a)(10), the factors mentioned would help establish an ocean common carrier's bona fide attempts and interest in fulfilling its previously made commitment to a shipper to take its cargo. Provision of a documented export policy includes a good faith effort in mitigating the impact of the refusal as well as evidence that the refusal was based on

legitimate transportation factors. These are all considerations the Commission could rely on to make a reasonableness finding.

In § 542.1(e), the Commission proposes a non-binding and non-exhaustive list of examples to show the type of conduct it could consider unreasonable pursuant to 46 U.S.C. 41104(a)(3). The examples listed are the types of situations that could signal that an ocean common carrier was not sincere in attempting to fulfill the previously agreed-to service terms and conditions.

The example in § 542.1(e)(4) identifies an issue raised in the comments. *See, e.g.*, Bass Tech at 1; IDFA at 2. The imposition by ocean common carriers of time restrictions on when a vessel can be loaded that are impracticably short thereby denies a shipper actual access to cargo space accommodations that have ostensibly been provided. As discussed, the focus of the rule is on eliminating impediments to access. The Commission may view carrier-imposed time constraints as unreasonable if they unduly deprive a shipper acting in good faith of access to cargo space.

Finally, the Commission believes it should keep open the opportunity to consider any other interactions or communications with the shipper as well as other conduct that the Commission finds unreasonable in any given case. Thus, the proposed list is considered non-exhaustive and only provides examples of conduct that could be considered unreasonable. The decision will be made on a case-by-case basis.

C. Section 542.1(f) through (h) – Claims under 46 U.S.C 41104(a)(10)

The Commission proposes adding new § 542.1(f) through (h) to define how a shipper can address unreasonable conduct by ocean common carriers that refuses to deal or negotiate with shippers regarding vessel space accommodations pursuant to 46 U.S.C. 41104(a)(10). Section 542.1(f) contains the elements of a claim. These elements are the same as those proposed in the NPRM.

Section 542.1(g) proposes a list of factors that the Commission may choose to consider in evaluating whether a particular ocean common carrier's conduct was unreasonable. The factors in this section are those that were proposed in § 542.1(b)(2)(i) through (iv) of the NPRM except that business decisions are no longer a factor to be explicitly considered. The Commission decided with the help of the public comments that there is the potential for business decisions to overwhelm the rest of the factors and thus it decided to remove that language from the proposed rule. In this SNPRM, the provision of a documented export policy, good faith effort showing an interest and ability in mitigating the impact of the refusal and evidence that the refusal was based on legitimate transportation factors are all considerations the Commission could rely on to make a reasonableness finding. The list is not exhaustive as other facts the Commission finds relevant could be considered. The factors in § 542.1(g) are the same as those proposed in § 542.1(d).

In 46 CFR 542.1(h), the Commission proposes a non-binding and non-exhaustive list of examples to show the type of conduct it could consider unreasonable pursuant to 46 U.S.C. 41104(a)(10). The examples listed are the types of situations that could signal that an ocean common carrier was not sincere in attempting to fulfill the previously agreed-to service terms and conditions.

The various proposed scenarios the Commission finds involve unreasonable conduct by ocean common carriers. These include: (1) quoting rates that are so far above market as to render the quote not a serious negotiation; (2) categorically or systematically excluding exports in providing vessel space accommodations, and (3) any other interactions or communications with the shipper or other conduct the Commission finds unreasonable.

The SNPRM rule proposes that quoting rates that are so far above market as to render the quote not a serious negotiation is unreasonable conduct. An ocean common carrier would be required to consider in good faith a shipper's effort at negotiation. Consideration in good faith includes, among other things, quotes that are within reasonable market rates. *See, e.g.*, NITL/ISRI at 13-14. If in response to a shipper's request for vessel space accommodations the

carrier quotes rates far above market (or insists on other terms, such as unrealistic quantity demands), it will likely be regarded under the SNPRM as an unreasonable refusal to deal or negotiate under 46 U.S.C. 41104(a)(10).

Finally, the Commission believes it should keep open the opportunity to consider any other interactions or communications with the shipper as well as other conduct generally the Commission finds unreasonable in any given case. Thus, the proposed list is considered non-exhaustive and just provides examples of conduct that could be considered unreasonable. The decision will be made on a case-by-case basis.

1. Section 542.1(i) – Use of Sweeper Vessels

In § 542.1(i), the Commission is proposing that the use of sweeper vessels is a legitimate practice that is critical to the efficiency of our transportation system. Along with the proposed definition, this paragraph serves as a reminder that a sweeper vessel must be one designated for that purpose. This provision is proposed to prevent ocean common carriers from using ad hoc designations of vessels as sweeper vessels to avoid having to take certain export shipments.

2. Section 542.1(j) – Documented Export Policy

This SNPRM modifies the voluntary documented export policy found in the NPRM and now proposes a requirement that ocean common carriers follow and submit to the Commission on a yearly basis a documented export policy. Proposing a requirement to submit a documented export policy to the Commission pursuant to its authority under 46 U.S.C. 40104 is an important part of monitoring the industry for unreasonable behavior vis-à-vis exports in an effort to address those concerns. Also, in § 542.1(j)(1), the Commission identifies what type of information it seeks to have included in a documented export policy that would help the Commission determine whether an ocean common carrier's conduct in a specific matter aligns with their general policies and that the ocean common carrier thus acted reasonably. The yearly requirement would provide an appropriate but not overly burdensome time frame on which to report updates to the policy relative to changes in the industry. The proposed report documenting an ocean common carrier's

export policy would remain confidential. Aggregate data may be provided in annual reports submitted to Congress or compiled for other purposes but will not reveal confidential information provided by or about individual carriers.

Although the Commission is not proposing in this SNPRM a voluntary export policy, it is interested in receiving comments on this alternative. The Commission believes the new proposed requirement to submit the export policy to the Commission on a yearly basis will enhance its ability to monitor the industry for prohibited actions but would also consider a voluntary approach. Maintenance of a voluntary documented export policy would allow ocean common carriers to maintain and provide a documented export policy showing how it developed and applied business decisions in a fair and consistent manner in the instance of a claim before the Commission. The documented export policy could also address situations, such as schedule disruptions (due to blank sailings or other conditions) on the ability to take on shipments. Carriers may also address the alternative remedies or assistance it will make available to a shipper who is refused vessel space accommodations. Developing this type of detailed information and providing it during the burden shifting process could assist the Commission's analysis when deciding whether the ocean common carrier's conduct was reasonable. The Commission seeks comments on these two approaches.

3. Proposed language in the NPRM removed in this SNPRM

The Commission is proposing revisions to § 542.1(d) of the NPRM by moving the burden shifting framework to § 542.1(k) and clarifying certain issues raised in the comments. Various commenters pointed out that this is the existing process under the APA. The new proposed section emphasizes that the burden shifting framework is not unique to this proposed rule and remains a legal requirement whether it appears in the SNPRM or not. Also, this SNPRM proposes including in § 542.1(k)(3) that the ultimate burden of persuading the Commission remains with the complainant (or BEIC). This language is responsive to comments received recommending this language be included.

The Commission also proposes to remove the self-certification by ocean common carrier provision in § 542.1(d) of the original proposed rule. Numerous commenters raised concerns about this voluntary provision and that they would be given undue weight in the Commission's analysis. Some commenters supported the provision if it was part of a more robust process including an independent evaluation of the information forming the basis of the certification. Although self-certification could have provided some useful information, a robust and mandatory self-certification approach addressing some of these concerns would require a more holistic and costly approach and the Commission finds it is not necessary at this time.

The Commission seeks comment and supporting information regarding all the proposed changes in this SNPRM.

IV. Public Participation

How do I prepare and submit comments?

Your comments must be written and in English. You may submit your comments electronically through the Federal Rulemaking Portal at www.regulations.gov. To submit comments on that site, search Docket No. FMC-2023-0010 and follow the instructions provided.

How do I submit confidential business information?

The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following by mail to the address listed above under **ADDRESSES**:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked "Confidential-Restricted," and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.

• A public version of your comments with the confidential information excluded. The public version must state "Public Version — confidential materials excluded" on the cover page and on each affected page and must clearly indicate any information withheld. You may submit the public version to the Commission by email or mail.

How can I read comments submitted by other people?

You may read the comments received on this SNPRM at www.regulations.gov by searching Docket No. FMC-2023-0010, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier.

V. Rulemaking Analyses

A. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601-612, provides that whenever an agency publishes a notice of proposed rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 553, the agency must prepare and make available for public comment a regulatory flexibility analysis describing the impact of the rule on small entities, unless the head of the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603-605. As the head of the agency, the Chairman, by voting to approve this SNPRM, is certifying that it will not have a significant economic impact on a substantial number of small entities.

B. National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. This SNPRM describes the Commission's criteria to determine whether an ocean common carrier has engaged in an unreasonable refusal to deal with respect to vessel space accommodations under 46 U.S.C. 41104(a)(10), and the elements necessary for a successful claim under that section. This rulemaking thus falls within the

categorical exclusion for matters related solely to the issue of Commission jurisdiction and the exclusion for investigatory and adjudicatory proceedings to ascertain past violations of the Shipping Act. *See* 46 CFR 504.4(a)(20), (22). Therefore, no environmental assessment or environmental impact statement is required.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public.[5] The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking.[6] As defined in 5 CFR 1320.3(c), "collection of information" comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. An agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid OMB control number.

This action contains new information collection requirements. The title and description of the information collection, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimates cover the time for reviewing instructions, searching existing sources of information, gathering and maintaining the information needed, and completing and reviewing the collection.

Title: Documented Export Policy

OMB Control Number: None assigned yet.

Summary of the Collection of Information: This SNPRM proposes a requirement that ocean common carriers create and maintain a documented export policy they submit to the Commission on a yearly basis.

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[5] 44 U.S.C. 3507.

[6] 5 CFR 1320.11.

Need and Proposed Use of Information: Proposing a requirement to submit a report documenting an ocean common carrier's export policy to the Commission pursuant to its authority under 46 U.S.C. 40104 is an important part of monitoring the industry for unreasonable behavior vis-à-vis exports. Also, in proposed § 542.1(j)(1), the Commission identifies what type of information it seeks to have included in a documented export policy that would help the Commission determine whether an ocean common carrier's conduct in a specific matter aligns with their general policies and that the ocean common carrier thus acted reasonably. The yearly requirement would provide an appropriate but not overly burdensome time frame on which to report updates to the policy relative to changes in the industry. An ocean common carrier can update their policy more frequently than once per year if it chooses to do so. The proposed reporting by individual ocean common carriers would remain confidential but, in practice, the Commission would provide aggregate descriptions and potentially best practices that do not contain individual carrier-level information but do provide information to the public and Congress (via annual report or other documents available to the public).

Frequency: This SNPRM proposes that respondents will file a documented export policy meeting the requirements in § 541.2(j) once per calendar year.

Type of Respondents: Ocean common carriers

Number of Annual Respondents: The Commission anticipates an annual respondent universe of 140 ocean common carriers.

Estimated Time per Response: The Commission estimates 40 hours of burden for developing, documenting, and submitting an export policy using the parameters in proposed § 541.2(j) for the first year, assuming that no such policy already exists. For annual updates, the estimated burden would be 5 hours including review and revisions of the existing policy and submitting it electronically.

Total Annual Burden: The Commission estimates the total person-hour burden at 5600 hours for initial filing and 700 hours thereafter.

Comments are invited on:

- Whether the collection of information will have practical utility;
- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by the methods described in the **ADDRESSES** section of this document.

D. Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at https://www.reginfo.gov/public/do/eAgendaMain.

List of Subjects in 46 CFR Part 542

Administrative practice and procedure, Non-vessel-operating common carriers, Ocean common carrier, Refusal to deal or negotiate, Vessel-operating common carriers, Vessel space accommodations.

For the reasons set forth in the preamble, the Federal Maritime Commission proposes to add 46 CFR part 542 to read as follows:

PART 542 – COMMON CARRIER PROHIBITIONS

Sec.

542.1 Definition of unreasonable refusal of cargo space accommodations when available and unreasonable refusal to deal or negotiate with respect to vessel space provided by an ocean common carrier.
542.2 [Reserved]

AUTHORITY: 5 U.S.C. 553; and 46 U.S.C. 46105, 40307, 40501-40503, 40901-40904, 41101-41106.

§ 542.1 Definition of unreasonable refusal of cargo space accommodations when available and unreasonable refusal to deal or negotiate with respect to vessel space provided by an ocean common carrier.

(a) *Purpose*. This part establishes the elements and definitions necessary for the Federal Maritime Commission (Commission) to apply 46 U.S.C. 41104(a)(3) with respect to refusals of cargo space accommodations when available and to apply 46 U.S.C. 41104(a)(10) with respect to refusals of vessel space accommodations provided by an ocean common carrier. This part applies to complaints brought before the Commission by a private party and enforcement cases brought by the Commission.

(b) *Definitions.* For the purposes of this section:

(1) *Cargo space accommodations* means space which has been negotiated for aboard the vessel of an ocean common carrier for laden containers being imported to or exported from the United States. Cargo space accommodations includes the services necessary to access and load or unload cargo from a vessel calling at a U.S. port.

(2) *Documented export policy* means a written report produced by an ocean common carrier that details the ocean common carrier's practices and procedures for U.S. outbound services.

(3) *Sweeper vessel* means a vessel exclusively designated to load and move empty containers from a U.S. port for the purpose of transporting them to another designated location.

(4) *Transportation factors* means factors that encompass the vessel operation considerations underlying an ocean common carrier's ability to accommodate laden cargo for import or export, which can include, but are not limited to, vessel safety and stability, weather-

related scheduling considerations, and other factors related to vessel operation outside the vessel operators' control.

(5) *Unreasonable* means ocean common carrier conduct that unduly restricts the ability of shippers to meaningfully access ocean carriage services.

(6) *Vessel space accommodations* means space available aboard a vessel of an ocean common carrier for laden containers being imported to or exported from the United States. Vessel space accommodations also includes the services necessary to access or book vessel space accommodations.

(c) *Elements for claims*. The following elements are necessary to establish a successful private party or enforcement claim under 46 U.S.C. 41104(a)(3):

(1) The respondent must be an ocean common carrier as defined in 46 U.S.C. 40102;

(2) The respondent refuses or refused cargo space accommodations when available; and

(3) The ocean common carrier's conduct is unreasonable.

(d) *Non-binding considerations when evaluating unreasonable conduct.* In evaluating the reasonableness of an ocean common carrier's refusal to provide cargo space accommodations, the Commission may consider the following factors:

(1) Whether the ocean common carrier followed a documented export policy that enables the efficient movement of export cargo;

(2) Whether the ocean common carrier made a good faith effort to mitigate the impact of a refusal;

(3) Whether the refusal was based on legitimate transportation factors; and

(4) Any other factors relevant in determining whether there was a refusal in that particular case.

(e) *Non-binding examples of unreasonable conduct*. The following are examples of the kinds of conduct that may be considered unreasonable under 46 U.S.C. 41104(a)(3) when linked to a refusal to provide cargo space accommodations:

(1) Blank sailings or schedule changes with no advance notice or with insufficient advance notice;

(2) Vessel capacity limitations not justified by legitimate transportation factors;

(3) Failing to alert or notify shippers with confirmed bookings;

(4) Scheduling insufficient time for vessel loading so that cargo is constructively refused;

(5) Providing inaccurate or unreliable vessel information;

(6) Categorically or systematically excluding exports in providing cargo space accommodations; or

(7) Any other conduct the Commission finds unreasonable.

(f) *Elements for claims*. The following elements are necessary to establish a successful private party or enforcement claim under 46 U.S.C. 41104(a)(10):

(1) The respondent must be an ocean common carrier as defined in 46 U.S.C. 40102;

(2) The respondent refuses or refused to deal or negotiate with respect to vessel space accommodations; and

(3) The ocean common carrier's conduct is unreasonable.

(g) *Non-binding considerations when evaluating unreasonable conduct*. In evaluating the reasonableness of an ocean common carrier's refusal to deal or negotiate with respect to vessel space accommodations, the Commission may consider the following factors:

(1) Whether the ocean common carrier followed a documented export policy that enables the efficient movement of export cargo;

(2) Whether the ocean common carrier engaged in good-faith negotiations;

(3) Whether the refusal was based on legitimate transportation factors; and

(4) Any other factors relevant in determining whether there was a refusal in that particular case.

(h) *Non-binding examples of unreasonable conduct*. The following are examples of the kinds of conduct that may be considered unreasonable under 46 U.S.C. 41104(a)(10) when linked to a refusal to deal or negotiate:

(1) Quoting rates that are so far above current market rates they cannot be considered a real offer or an attempt at engaging in good faith negotiations;

(2) Categorically or systematically excluding exports in providing vessel space accommodations; and

(3) Any other interactions or communications with the shipper or other conduct the Commission finds unreasonable.

(i) *Use of sweeper vessels*. Nothing in this part precludes ocean common carriers from using sweeper vessels previously designated for that purpose to reposition empty containers.

(j) *Documented export policy.* Ocean common carriers must follow a documented export policy that enables the efficient movement of export cargo.

(1) A documented export policy must be submitted once per calendar year and include, in a manner prescribed by the Commission, pricing strategies, services offered, strategies for equipment provision, and descriptions of markets served. Updates may be submitted more than once per year if the ocean common carrier chooses to do so. Other topics a documented export policy should also address, if applicable, include:

(i) The effect of blank sailings or other schedule disruptions on the ocean common carrier's ability to accept shipments; and

(ii) The alternative remedies or assistance the ocean common carrier would make available to a shipper to whom it refused vessel space accommodations.

(2) A documented export policy required to be filed by this part must be submitted to: Director, Bureau of Trade Analysis, Federal Maritime Commission, exportpolicy@fmc.gov.

(k) *Shifting the burden of production*. In accordance with applicable laws, the following standard applies:

(1) The burden to establish a violation of this part is with the complainant or Bureau of Enforcement, Investigations, and Compliance.

(2) Once a complainant sets forth a prima facie case of a violation, the burden shifts to the ocean common carrier to justify that its action were reasonable.

(3) The ultimate burden of persuading the Commission remains with the complainant or Bureau of Enforcement, Investigations, and Compliance.

§ 542.2 [Reserved]

By the Commission.

William Cody,
Secretary.

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